IN THE

Supreme Court of the United States

October Term, 1975

Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

No. 74-1656

JOHN C. MOE, et al,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

THE STATE OF MONTANA, et al,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellants,

v.

JOHN C. MOE, et al,

Appellees.

On Appeal from the United States District Court For the District of Montana

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ARGUMENT

1.

Constitutional due process and equal protection entitle the State of Montana to collect cigarette and personal property taxes from Indian citizen residents on the Flathead Reservation.

Appellees, relying primarily on *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164 (1973), argue that absent further affirmative Congressional action, the State of Montana may not assert jurisdiction to collect cigarette and personal property taxes. Additional Congressional action is not required. The obligation of individual Indian citizens to assume their fair share of tax obligations which finance state services provided to them and the right of the State of Montana to collect such taxes are rooted in constitutional due process and equal protection of the Fifth and Fourteenth Amendments. The protections afforded by these Amendments are self executing. *Civil Rights Cases,* 109 U.S. 3 (1883) and *Adams v. Maryland,* 347 U.S. 179 (1954). No further Congressional action is necessary or appropriate to implement their safeguards.

The general power of Congress to regulate commerce with the Indian tribes under Art. 1, Sec. 8, Cl. 3, and legislation enacted pursuant to that power must always be weighed against the fundamental principles embodied in the Fifth and Fourteenth Amendments. The general regulatory authority in Art. I, Sec. 8, Cl. 3, cannot be read to limit the free exercise of personal rights and obligations of all citizens of the State of Montana, including Indian citizens, guaranteed by the Fifth and Fourteenth Amendments. Any conflict between the general regulatory clause and the Amendments must be resolved in favor of the Amendments. *Schick v. United States,* 195 U.S. 65 (1904). See also *Strauder v. West Virginia,* 100 U.S. 303 (1879).

That treatment of Indian citizens differently from

non-Indians by the state results in a denial of due process and equal protection cannot be denied. This proposition was specifically acknowledged by the Montana Supreme Court in *Security State Bank v. Pierre,* 162 Mont. 298, 511 P.2d 325 (1973). That Court considered itself helpless, however, to "afford the equal protection of our law to both its Indian and nonIndian citizens on civil matters arising within the exterior boundaries of an Indian reservation" (162 Mont. at 305). This Court is under no such constraint.

2.

The specific language of the General Allotment Act making Indian patentees subject to state law does not conflict with the Montana Enabling Act or the Indian Reorganization Act.

Constitutional considerations aside, the language of the General Allotment Act, (24 Stat. 390, 25 U.S.C., § 349), is clear — Indian patentees, upon receipt of fee patents, became subject to the laws of the State of Montana. The significance of the Act lies in the fact that it had its effect directly upon individual Indians. By contrast, the portions of the Montana Enabling Act of February 22, 1889 (25 Stat. 676), and the Indian Reorganization Act of 1934 (48 Stat. 984, 25 U.S.C. §§ 461, 462) relied upon by the Tribes, both relate to the status of land titles and the control of such lands by the United States. Neither Act reaches the question of the right of the state to exercise jurisdiction over individual Indian citizens who had received fee patents under the General Allotment Act.

The interrelationship between the General Allotment Act and the Montana Enabling Act was discussed by this Court in *Draper v. United States,* 164 U.S. 240 (1896). There Mr. Justice White speaking for the Court noted:

> "From these enactments it clearly follows that at the time of the admission of Montana into the

> Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the State to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, *and in which contingency the Indians themselves would have passed under the authority and control of the State.*" (Emphasis added.) (164 U.S. at 246.)

3.

The prohibition against federal jurisdiction in 28 U.S.C., Sec. 1341, bars suit to enjoin State action to collect taxes.

In these cases individual Indian citizens of the State of Montana seek to avoid and enjoin payment of state taxes. The absolute prohibition against such individual citizen suits voiced in *American Commuters Association, Inc. v. Levitt,* 405 F.2d 1148 (2nd Cir. 1969) and *Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972), remains unanswered by the Tribes and their members.

4.

Issues of this appeal unaffected by settled income tax case.

The settled income tax case between the Tribes and certain of their members and the State of Montana is not a

part of the record in this appeal. The stipulation filed as a part of the settlement of that action (App. C, Brief for the Appellees) neither limits nor affects inquiry into the fundamental issues now before this Court. Determination of such issues, particularly constitutional issues, is solely for the courts. Cf. *United States v. Butler* 297 U.S. 1, (1936), and *Sage v. Baldwin* 55 F.2d 968 (N.D.Tex. 1932).

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CERTIFICATE OF MAILING

I, SAM E. HADDON, one of the attorneys for the Appellants, certify that on the 14th day of January, 1976, I served three copies of the foregoing REPLY BRIEF FOR THE APPELLANTS on each of the counsel for Appellants herein by mailing true copies thereof, first class postage prepaid as follows:

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